Supreme Court, U.S.
FILED
(2)
99 970 DEC - 6 1999
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM RUSSELL AIKEN, et al
Petitioner(s)

v.

CITY OF MEMPHIS, TENNESSEE
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William B. Aitchison
OSB 77009
Counsel of Record
Aitchison & Vick, Inc.
3021 N.E. Broadway
Portland, Oregon 97232
(503) 282-6160

9038

William Russell AIKEN, et al., Plaintiffs-Appellants,

v.

CITY OF MEMPHIS, Tennessee, Defendant-Appellee.

No. 97-6371.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 18, 1998.
Decided Sept. 7, 1999.

Affirmed.

Ryan, Circuit Judge, filed opinion concurring in part and dissenting in part.

William B. Aitchison (argued), Aitchison & Vick, Portland, Oregon, Edwin Dean White III (briefed), Farris, Mathews, Branan & Hellen, Memphis, Tennessee, for Appellants.

Louis P. Britt III (argued and briefed), McKnight, Hudson, Ford & Harrison, Memphis, Tennessee, for Appellee.

Before: MARTIN, Chief Judge; RYAN and COLE, Circuit Judges.

COLE, J., delivered the opinion of the court, in which MARTIN, C. J., joined. RYAN, J. (pp. 762-65), delivered a separate opinion concurring in part and dissenting in part.

COLE, Circuit Judge.

Plaintiffs, past and present Memphis police officers, brought an action against the city of Memphis asserting various claims under the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. §§ 201 et seq. Plaintiffs currently appeal the district court's dismissal of two of those claims on summary judgment and the court's final judgment in favor of the city on three other claims. For the following reasons, we AFFIRM the judgments of the district court.

I.

Plaintiffs filed this action on January 7, 1993. During the course of the litigation, plaintiffs alleged, among other things: that certain aspects of the city's sick leave policy violate the FLSA; that the Act requires the city to compensate canine officers for the time they spend commuting to work with their assigned dogs; that aspects of the city's policy

regarding the use of compensatory time violate the FLSA; that police captains are not exempt from FLSA overtime requirements; and that officers are entitled under the Act to compensation for time spent maintaining and commuting to work in city vehicles. The district court granted the defendant's motion for summary judgment on plaintiffs' first two claims. Following a pretrial conference, the parties submitted the remaining claims to the district court for a decision based on trial memoranda, stipulations, and exhibits. The district court eventually found in favor of the city on these claims as well. This timely appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. See Hartsel v. Keys, 87 F.3d 795, 799 (6th Cir.1996). We affirm "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When

evaluating an appeal, this Court views the evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

On the issues that the district court ruled on at trial, we review the district court's conclusions of law de novo. See Doe v. Claiborne County, 103 F.3d 495, 505 (6th Cir.1996). We review its findings of fact for clear error. See United States v. Martin, 95 F.3d 406, 408 (6th Cir.1996).

III. DISCUSSION

III.A Compensatory Time

Plaintiffs contend that the district court erred by ruling that the city's policy regarding the use of compensatory time does not violate the FLSA. Pursuant to memoranda of understanding between the city and the plaintiffs' union, officers who work overtime may choose between receiving overtime pay or compensatory time. Officers can accumulate up to 480 hours of compensatory time. The memoranda dictate that an officer wishing to use accrued compensatory time must

sign his or her precinct's compensatory time log book any time within thirty days of the requested day off. However, the city also requires that the commanding officer of each precinct monitor its log book to ensure that each shift is adequately staffed. If the commanding officer determines that further requests for time off would adversely affect the functioning of the unit, based on the circumstances of the case, he or she will not allow more officers to sign up to use compensatory time on that particular day.

The plaintiffs argue that this practice of closing a precinct's log books violates the FLSA. The Act allows public agencies to provide, in lieu of overtime, "compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section." 29 U.S.C. § 207(o)(1). The Act imposes several conditions on a public agency's ability to offer compensatory time, however. Two are relevant for the purposes of this case. First, an employer may grant compensatory time in lieu of overtime pay pursuant only to a

collective bargaining agreement, or other agreement. See 29 U.S.C. § 207(o)(2)(A). Second, an employee "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5).

The plaintiffs' argument focuses on the phrase "unduly disrupt" in § 207(o) (5). They begin by arguing that § 207(o)(5) requires an employer to grant an employee's reasonably timed request for the use of banked compensatory time, unless the use of the time would be unduly disruptive. See 29 C.F.R. § 553.25(d) ("For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of an acceptable quality and quantity for the public during the time requested without the employee's services."); S.Rep. No. 99-159 (1985) ("By unduly disruptive, the Committee means something more than mere

inconvenience."). The city, however, acknowledges its policy is not to grant overtime pay to one officer so that another can use compensatory time on a requested date. Plaintiffs contend that the payment of overtime to an officer so that another can use banked compensatory time is not an undue disruption. See Heaton v. Moore, 43 F.3d 1176, 1181 (8th Cir.1994) ("Moreover, the eventual payment of overtime compensation cannot be deemed 'unduly disruptive.' "); 52 Fed.Reg. 11,2017 (1987) ("The Department recognizes that situations may arise in which overtime pay may be required of one employee to permit another employee to use the compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive."). Plaintiffs conclude, therefore, that the city violates the Act by shutting the logbooks not at the point of undue disruption, but rather at the point at which a precinct would begin having to pay replacement officers on an overtime basis.

The fundamental defect in the plaintiffs' position, however, is that it completely ignores the phrase "reasonable period," which the Act gives the parties the freedom to define. See Moreau v. Harris County, 158 F.3d 241, 246-47 (5th Cir.1998); see also 29 C.F.R. § 553.23(a)(1) (providing that agreements between employers and employees with regard to compensatory time are valid as long as they are not in conflict with the FLSA itself). Title 29 C.F.R. § 553.25(c)(2), specifically provides that:

> The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.)[1] To the extent that the conditions

---

[1] Title 29 C.F.R. s 553.23 provides, in its relevant sections:
(a) General.
(1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees....
(2).The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act....

> under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period."

(emphasis added). Furthermore, in the comments to the final version of 29 C.F.R. § 553.25, the Department of Labor stated that:

> The Department believes ... that some parties may choose to include in their agreement or understanding the conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms.

52 Fed.Reg. 11,2017 (1987); see also Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 911, 137 L.Ed.2d 79

(b) Agreement or understanding between the public agency and a representative of the employees.
(1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement.

(1997) (Secretary of Labor's interpretation of own regulations is controlling unless plainly erroneous).[2]

In this case, the city and the plaintiffs' union had an agreement on the issue of compensatory time. The agreement provided "the conditions under which an employee can take compensatory time off." 29 C.F.R. § 553.25. These include a condition that once a certain number of officers requested a specific day off, the commanding officer may close the precinct's log book for that day. The city and the union in this case have agreed, then, that the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given

[2] We acknowledge some difficulty reconciling 29 C.F.R. § 553.25(c)(2) and 29 C.F.R. § 553.25(d). The Seventh Circuit, however, has recently noted the importance of private ordering in FLSA cases, even in situations in which the FLSA has not granted parties the broad freedom to contract that it has here. See Dinges v. Sacred Heart St. Mary's Hospitals, Inc., 164 F.3d 1056, 1059 (7th Cir.1999) ("[W]e must take account of the arrangement plaintiffs themselves chose.... Although the FLSA overrides contracts, in close cases it makes sense to let private arrangements endure--for the less flexible statutory approach has the potential to make everyone worse off."). We agree.

date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. We are loath to interfere with this agreement. Therefore, we conclude that the district court did not err by finding for the city on this claim.

III.B Canine Commute Time

Plaintiffs also contend that the district court erred by granting summary judgment in favor of the city on plaintiffs' claim for compensation for canine commute time. Memphis maintains a "Canine Squad," of which some plaintiffs are members. The city assigns each member of the squad a dog and a vehicle to transport the animal. The city also requires that members board the dogs at their homes and that they feed, train, walk, and clean up after their four-legged partners. The parties have settled most of the issues relating to compensation for time officers spend caring for dogs while not on duty. However, as the dogs reside in squad members' homes, the city also requires each canine officer to drive his or her dog to work in the vehicles that the city provides. Plaintiffs contend that squad members spend a significant amount of time during

their commutes "feeding, training, walking, and cleaning up after the dog[s]." Nevertheless, the city does not compensate officers for either their entire commuting time or for the time during the commute that they spend caring for dogs. Plaintiffs contend that this policy violates the Act. We disagree.

"The Portal-to-Portal Act, which amended the FLSA in 1947, 29 U.S.C. § 521 et seq., represented an attempt by Congress to delineate certain activities which did not constitute work," and which are therefore non- compensable. See Reich v. New York City Transit Auth., 45 F.3d 646, 649 (2nd Cir.1995). "[W]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is one example of a non-compensable activity. 29 U.S.C. § 254(a)(1). Similarly, employees are not entitled to compensation under the Act for "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or

subsequent to the time on any particular workday at which he ceases, such principal activity." 29 U.S.C. § 254(a)(2). The effect of these sections is to make ordinary commute time non-compensable under the FLSA.

Despite these provisions, an employee is entitled to payment for any work that the employer requires the employee to perform during the commute. See 29 C.F.R. § 785.41. Several courts recently have addressed the issue of the compensability of canine care that occurs during commutes; the leading case is Reich. "Feeding, training, and walking [a police dog] are work" and are therefore compensable activities. Reich, 45 F.3d at 651. It follows, then, that to the extent that "[s]uch true dog-care work occurr[s] during the commute [it] is not exempted from compensation by the Portal-to-Portal Act." Id. at 652.

Plaintiffs, however, have not adduced evidence that canine officers spend more than a de minimis amount of time during their commutes engaged in such activities. See Reich, 45 F.3d at 652-53; see also Bobo v. United States, 136 F.3d

1465, 1468 (1998); Andrews v. DuBois, 888 F.Supp. 213, 219 (D.Mass.1995); Levering v. District of Columbia, 869 F.Supp. 24, 29-30 (D.D.C.1994). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or the Fair Labor Standards Act." See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); see also United States Dep't of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 780 (6th Cir.1995). Plaintiffs' affidavits demonstrate only that officers must "occasionally stop to feed the dog, let him out of the car or clean up after him while traveling to work." Although plaintiffs' affidavits also indicate that officers must "constantly" and "on a regular basis" discipline their dogs, such generalities do not create a question of fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (holding that a mere scintilla of evidence in support of the nonmoving party's position is

insufficient to survive a motion for summary judgment). Even if we were inclined to conclude, which we are not, that this "evidence" indicates that, over the course of a commute, the seconds that it takes to discipline a dog--even on a regular basis--could add up to a significant amount of time, we are at a loss as to how Memphis could be expected to document such time. See Lindow v. United States, 738 F.2d 1057, 1062-63 (9th Cir.1984) (setting forth factors relevant to the de minimis doctrine, including size of the aggregate claim and practical difficulty of recording the time).

III.C Vehicle Maintenance & Non-Canine Commute Time

The plaintiffs also contend that the district court erred by ruling in favor of the city with regard to other commuting issues. The city provides some officers vehicles for use in commuting to and from work. If an officer is assigned a take-home vehicle, the officer must schedule maintenance for the vehicle, must keep the vehicle's radio on during the commute, and must respond to disabled vehicles or crimes that the officer observes during the commute. Plaintiffs sought

compensation for the time they spend cleaning and scheduling maintenance for their city vehicles, and for the time spent commuting to work in them.

On the cleaning and maintenance issue, plaintiffs claims are without merit. The FLSA provides that:

> [T]he use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a) (emphasis added). Plaintiffs do not argue that officers' use of police vehicles for commuting purposes takes officers outside of their normal commuting areas or that there is no agreement between the city and the officers' union covering these matters. Keeping vehicles clean and scheduling maintenance to be done at the city's expense are hardly arduous and precisely the sort of activities that Congress had in mind when it used the phrase "incidental to the use of [the

employer's] vehicle." Id. The legislative history of the 1996 amendments is instructive: "It is not possible to define in all circumstances what specific tasks and activities would be considered 'incidental' to the use of an employer's vehicle for commuting.... [R]outine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable." H.R. Rep. 104-585.

On the issue of compensation for the entire commute, we likewise find that the district court did not err; monitoring a police radio does not convert commute time into compensable work. Cf. Bartholomew v. Burlington, 5 F.Supp.2d 1161, 1170 (D.Kan.1998) (employer requirement that out-going officer brief in-coming officer during commute does not change nature of travel time). Plaintiffs contend that they should be compensated because they must respond to emergencies that they observe while driving to work or that are communicated by radio dispatch. They also contend that

they should be compensated because the presence of marked police vehicles on the city's streets deters crime.

Plaintiffs are incorrect. As an initial matter, if an officer takes time out of his or her commute to respond to an incident, he or she is compensated if the response takes more than thirty minutes.[3] Second, although the presence of marked police cars on the streets arguably deters crime, this is irrelevant for FLSA purposes. See Hellmers v. Vestal, 969 F.Supp. 837, 843 (N.D.N.Y.1997) ("Nowhere in the [FLSA] does there appear to be an exemption for commuting time spent in marked police cars."); H.R. Rep. 104-585 ("The fact that a vehicle may been modified for special purposes, displays company logos, or is specially equipped does not alter the nature of such travel."). Finally, the amount of work

[3] The city apparently takes the position that shorter stops are de minimis. Plaintiffs note that shorter stops are not compensated, but do not argue that the city's threshold length of time for compensability is too high, choosing instead to argue that all commuting time is compensable.

involved in monitoring a police radio during a commute is simply de minimis.[4] Again, the district court did not err.

III.D. Location-When-Ill Policy

The plaintiffs contend that the district court erred in granting summary judgment on the issue of whether the city's Location-When-Ill (LWI) policy, DR 1104, violates the FLSA. The department pays employees on leave for illness or an on-the-job injury at their normal hourly rate for their regular shifts. The department's LWI policy, however, regulates the activities of employees who are on leave. It provided, during the time period in question,[5] that "[a] member reporting sick or injured shall be confined to his or

---

[4] This case is distinguishable from those that have held that a requirement that employees monitor a noisy radio converts on-call time to work. See, e.g., Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916- 17 (8th Cir.1991). In those cases, the key is whether monitoring the device, even where it is portable, prevents employees from using their free time as they wish. For example, a squawking radio would hardly be welcome in church, the library, or the movies; it would effectively prevent the employee from engaging in any pursuit in a location that demands quiet. Here, however, the question is whether the employer requires the employee to perform a significant amount of work during the commute. Under the facts of this case, we conclude that the answer is no.

[5] After the commencement of this litigation, the city "clarified" the LWI policy. It now provides that it applies only "during his or her scheduled duty hours."

her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor."[6] The policy thus placed no restrictions on an officer's activities while at home, but if an officer left home without permission, he or she was subject to discipline. The record indicates that the city enforced the policy with checks by supervisors every third day. The department made checks "at all hours." It conducted them by phone, but if there was no response, the city sent someone to the officer's residence.

Plaintiffs claim, however, that the LWI policy was so onerous and intrusive that any waking hour spent under it counts as an hour worked for the purposes of the FLSA. Therefore, plaintiffs claim that they are entitled to overtime compensation for "non-sleeping time spent outside of their regular workshifts under the structures of DR 1104."

---

[6] The reason for this policy was, as the defendant puts it, to dissuade officers from "the inappropriate practice of using 'sick' days as additional vacation days."

Generally speaking, the FLSA requires employers to compensate an employee at a rate of pay not less than one and one-half times the employee's normal rate of pay for hours the employee works above the statute's applicable maximum workweek. See 29 U.S.C. § 207(a). Under certain circumstances, employer restrictions on what is ostensibly an employee's free time can cause such time to count as hours worked. See 29 C.F.R. § 553.221(c), (d). The question confronting this Court is analogous to that posed by cases considering the compensability of "on-call" time.[7] An employer must compensate an employee for time spent "predominantly for the employer's benefit." Martin v. Ohio Turnpike Comm'n, 968 F.2d 606, 609 (6th Cir.1992) (citing Armour & Co. v. Wantock, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944)); see also 29 C.F.R. § 553.221(c), (d). In other words, the question in on-call cases is whether the

[7] An on-call employee leaves the employer's premises "with the understanding that he or she is expected to return to work" if called in. 29 C.F.R. § 553.221.

employer's restrictions on officers' time "prevent the employees from effectively using the time for personal pursuits." Martin, 968 F.2d at 611. "That some of the plaintiffs' personal activities may have been affected is not enough." Id. In making this determination, the Court examines "all the circumstances of the case." Id. at 609 (internal quotes omitted). "[A]n employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA." See Dade County v. Alvarez, 124 F.3d 1380, 1384 (11th Cir.1997) (internal quotes omitted), cert. denied, --- U.S. ----, 118 S.Ct. 1804, 140 L.Ed.2d 943 (1998).

Using this fact-specific standard as a guide, it is clear that time Memphis officers spend subject to the city's LWI policy is not compensable work.[8] At home, such officers are

[8] An initial, and obvious, difference between this an on-call cases in which courts have held employee time compensable is that an officer on LWI leave is presumed to be too ill or injured to work. Therefore a Memphis officer on leave does not have to contend with the possibility of being called in by the department.

free to use their time as they please. Although they must receive permission before leaving home--assuming of course that the officer is well enough to leave home--there is no evidence in the record to indicate that Memphis ever, let alone routinely, denied permission. Thus, we conclude that Memphis's insignificant phone-in burden does not transform recovery time into work, as it is not "so onerous as to prevent employees from effectively using the time for personal pursuits." Martin, 968 F.2d at 611. Indeed, the relatively few cases that have held on-call time compensable involved a significantly greater intrusion on employees than exists in this case. See, e.g., Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 678-79 (5th Cir.1991) (employee on call 24 hours a day, 365 days a year, must always be sober and within 20 minutes of work); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17 (8th Cir.1991) (employees required to monitor noisy hand-held radio 24 hours per day, forcing them to concentrate on radio all day and preventing them from going anywhere noise would be unwelcome); see

also Berry v. County of Sonoma, 30 F.3d 1174, 1183 (9th Cir.1994) (listing as one of the "illustrative, non-exhaustive" list of factors that a court should consider in determining whether an employee is free to engage in personal activities "whether there were excessive geographical restrictions on employee's movements"). The district court was correct to dismiss this claim.

III.E. Exempt Status of Captains

Finally, plaintiffs contend that the district court erred by ruling in favor of the city on plaintiffs' claim regarding police captains. Memphis does not pay overtime to captains because it classifies them as salaried, executive employees. The FLSA does not require employers to provide overtime pay to "bona fide executives." 29 U.S.C. § 213(a)(1). The regulations implementing the FLSA provide that for an employee to fall within this exemption, that employee must be paid on a "salary basis." 29 C.F.R. § 541.1(f). An employee is so paid "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a

predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118.

The plaintiffs contend that the police captains are not bona fide executives for the purposes of the FLSA because they were subject to pay reductions for disciplinary infractions relating to the "quality or quantity" of their work. The City of Memphis Civil Service Rules[9] provide that if a Memphis employee commits a violation of the rules, the employee is subject to several disciplinary actions, including "unpaid suspension of a duration as short as one day." Although these rules theoretically apply to all Memphis employees, there is no rule that specifically provides that police captains are subject to suspensions. Only one captain--not a plaintiff in this case--has ever been suspended without pay for disciplinary reasons.

---

[9] "Penalties imposed for safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). Defendant apparently concedes that some of the rules in question are not "safety rules of major significance."

In Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), a case with facts virtually identical to those in the case before us, the Supreme Court considered whether "an employee's pay is 'subject to' disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced." Id. at 459, 117 S.Ct. 905. The Auer plaintiffs, several sergeants and a lieutenant, along with all other St. Louis police department employees, were nominally covered by a police manual that listed 58 possible rules violations and also listed several possible penalties associated with each, including, in some instances, deductions in pay. The Court held that the plaintiffs were nevertheless salaried employees under the salary-basis test. Deferring to the Secretary of Labor's interpretation of the FLSA, the Court wrote that employees are denied exempt status under the test only when "employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'

" Id. at 461, 117 S.Ct. 905 (emphasis added). This is so when the employer has either (1) "an actual practice of making such deductions," or (2) "an employment policy that creates a significant likelihood of such deductions." Id. (internal quotations omitted). A "one-time deduction in a sergeant's pay, under unusual circumstances," was not sufficient to establish the former. Id. at 462, 117 S.Ct. 905. A manual that applied to all department employees, and thus that did not "effectively communicate that pay deductions are an anticipated form of punishment for employees in petitioners' category," did not establish the latter. Id. The Court concluded that Its holding was the most sensible, since it "avoids the imposition of massive and unanticipated overtime liability (including the possibility of substantial liquidated damages) in situations in which a vague or broadly worded policy is nominally applicable to a whole range of employees but is not 'significantly likely' to be invoked against salaried employees." Id. at 461, 117 S.Ct. 905.

In this case, there is nothing to indicate that Memphis police captains are anything other than salaried employees.[10] They may be theoretically subject to pay reductions, but as a "practical matter" they are not. The evidence shows that only one captain ever faced a deduction in pay. Thus, plaintiffs cannot demonstrate an actual practice of applying such deductions to captains. By plaintiffs' own admission, the Civil Service rules apply to all department employees. Thus, the policy does not effectively communicate that captains will be suspended in any specified circumstance. Again, we conclude that the district court did not err.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of the district court.

---

[10] On facts virtually identical to the ones here, several courts have followed Auer. See, e.g., West v. Anne Arundel County, 137 F.3d 752, 762-63 (4th Cir.1998); Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir.1997); Stanley v. City of Tracy, 120 F.3d 179, 183-84 (9th Cir.1997); Ahern v. County of Nassau, 118 F.3d 118, 121 (2nd Cir.1997); Carpenter v. City of Denver, 115 F.3d 765, 767 (10th Cir.1997); Balgowan v. New Jersey, 115 F.3d 214, 219 (3d Cir.1997); DiGiore v. Ryan, 987 F.Supp. 1045, 1052 (N.D.Ill.1997).

CONCURRING/DISSENTING OPINION

RYAN, Circuit Judge, concurring in part and dissenting in part.

In my view, neither the district court nor the majority here come squarely to grips with the plaintiffs' claim that they are, on some occasions, being denied compensatory time off for reasons forbidden under the Fair Labor Standards Act and its implementing regulations. The result, in my judgment, is that the plaintiffs continue to be denied relief to which they are entitled.

The parties agree that 29 U.S.C. § 207(o)(5)(B) assures that, in this case, an officer

> shall be permitted by the employee's employer to use [comp] time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

Thus, under this subsection there are two conditions precedent that must be satisfied before an employee may take comp time off: (1) the employee must be permitted to take the comp time within a reasonable period of time after making his

request; and (2) taking the comp time must not unduly disrupt the operations of the Memphis Police Department.

One of the implementing regulations adopted by the Department of Labor provides that

> [t]o the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding ... the terms of such agreement or understanding will govern the meaning of "reasonable period."

29 C.F.R. § 553.25(c)(2).

The parties agree that there is a collective bargaining agreement in place between them. Unfortunately, the agreement, the foregoing agency regulation notwithstanding, does not define the term reasonable period. However, a Department of Labor regulation does define reasonable period as follows:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak

> workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

29 C.F.R. § 553.25(c)(1).

The regulation also defines the expression unduly disrupt as follows:

> (d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.25(d).

The plaintiffs concede that the defendant's precinct commanders may properly reserve to themselves the authority to determine when the logbooks are "full," so that the "manning" in the precinct will not fall below necessary levels

and thus unduly disrupt the operation of the police department. The plaintiffs insist, however, that the precinct commanders are declaring the logbook full, not when there is a risk of manpower falling below what is necessary for the public safety, but rather when the number of officers requesting comp time off reaches the point that it will be necessary to pay their replacement officers at the overtime rate of pay. That excuse for declaring the logbook full, the plaintiffs argue, is not permitted under the FLSA, or the Labor Department regulations, or the collective bargaining agreement between the parties, because paying a replacement officer at the overtime rate does not unduly disrupt the operation of the police department as that term is defined in 29 C.F.R. § 553.25(d) and has nothing whatever to do with the "reasonable period" within which the comp time may be used following a request for it. In addition, the plaintiffs point to Department of Labor commentary on the application of the FLSA which provides: The Department [of Labor] recognizes that situations may arise in which overtime may be required of one

employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.

Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52, Fed.Reg.2012, 2017 (1987).

To the same effect, argue the plaintiffs, is an Eighth Circuit decision in Heaton v. Moore, 43 F.3d 1176, 1181 (8th Cir.1994), which holds that the fact that an employer must pay an employee overtime compensation in order to permit another employee to use accrued compensatory time off, does not, of itself, constitute an undue disruption allowing the employer to deny the request.

The defendant acknowledges that it has a policy of not permitting comp time to be taken if it would require the department to bring in a replacement officer at the overtime rate of pay. Plaintiffs claim that more often than not it is the application of this policy, forbidden by the federal regulations,

that the precinct commanders employ to declare the logbooks full.

The district court failed to come to grips with this argument, stating only that "the City could have allowed the officer the time off by paying another officer overtime compensation to work in the requesting officer's place [,but] [a]s general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time." Aiken v. City of Memphis, 985 F.Supp. 740, 745 (W.D.Tenn.1997). The district court then observed that a denial of compensatory time off for that reason "only occurred occasionally and was not routine." Id. The plaintiffs claim it occurs all the time.

Instead of resolving this difficult, mixed question of fact and law, the district court merely held, as the majority opinion in this court does, that the entire issue is governed by the collective bargaining agreement between the parties, and the collective bargaining agreement has a provision as to the reasonable period within which time off may be requested.

The district court's reasoning, although to me rather abstruse, apparently is that if an officer doesn't make a request for comp time early enough to assure that his replacement need not be paid time-and-a-half, then the officer will not have requested his time off within a reasonable period. The problem, of course, with that sort of reasoning is that it conflates the concept of the reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken. Thus, the plaintiffs' claim that the logbook is being declared full for a forbidden reason is never directly engaged.

The majority opinion likewise dodges the problem, simply by declaring that the whole issue is governed by the collective bargaining agreement, and the majority is "loath to interfere with [the] agreement."

To me, that answer, like the district court's answer, is no answer at all. The district court made a factual finding that "[a]s a general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for

compensatory time." Aiken, 985 F.Supp. at 745. In my opinion, this policy is precisely the practice the Department of Labor contemplated, and sought to forbid, when it declared that it would not be an undue disruption for an employer to ask one employee to work overtime in order to grant another employee time off. See Application of the Fair Labor Standards Act to Employees of State and Local Governments 52 C.F.R.2012, 2017 (1987). I would reverse the judgment of the district court with respect to this issue only. As to the remaining issues in the case, I concur in the majority opinion.

William Russell AIKEN, et al., Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, Defendant.

No. 93-2023-TUA.

United States District Court,
W.D. Tennessee,
Western Division.
Aug. 26, 1997.

CONSENT ORDER OF DISMISSAL OF CLAIMS

TURNER, District Judge.

The parties, through counsel, having advised the Court that the parties have reached a settlement with respect to Plaintiffs' claim for unpaid compensation for the home training, maintenance and care of police dogs and training time, and that those claims may be dismissed,

IT IS, THEREFORE, ORDERED that Plaintiffs' claims for unpaid compensation for home training, maintenance and care of police dogs and training time be and are hereby dismissed.

So ordered this 26th day of August, 1997.

William Russell AIKEN, et al., Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, Defendant.

No. 93-2023-TUA.

United States District Court,
W.D. Tennessee,
Western Division.

Aug. 8, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TURNER, District Judge.

Plaintiffs, employees of the Memphis Police Services Division, filed this class action on January 7, 1993, alleging that the City of Memphis (the "City") had violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., by failing to pay them overtime wages. By order entered January 2, 1996, this court granted defendant's motion for partial summary judgment on issues relating to travel time and the "Location When Ill" Policy. On November 25, 1996, the parties submitted the case to the court on trial memoranda, stipulations, and exhibits for a final determination of the

remaining claims. Currently before this court are four issues: (1) whether the City's classification of police captains as exempt from overtime requirements is correct; (2) whether officers are entitled to compensation for time spent commuting to or from work in a police vehicle; (3) whether officers are entitled to compensation for time spent cleaning and maintaining police vehicles; and (4) whether the City's compensatory time policy is violative of the FLSA. The parties have reserved the issue of damages until liability has been determined.

I. General Findings of Fact

The City's law enforcement services are provided by the City of Memphis Police Services Division (the "Division"). The plaintiffs are or have been employees of the City and more particularly the Division. The City is a political subdivision of the State of Tennessee and a public agency within the meaning of 29 U.S.C. § 203(x). The City is also an enterprise within the meaning of 29 U.S.C. § 203(r).

II. Exempt Status of Captains

A. Findings of Fact

[1] The City does not pay overtime compensation to police captains because the City has classified them as salaried employees. Under the City's policies police officers, including captains, are subject to disciplinary suspensions without pay for periods of less than one day. No captain has ever been disciplined by receiving a suspension without pay.

B. Conclusions of Law

[2] The captain plaintiffs claim that the City wrongfully classified them as employees exempt from the overtime requirements of the FLSA. Under the FLSA, employers are not required to pay overtime compensation to "bona fide executives" who exceed the maximum work hours per week. 29 U.S.C. § 213(a)(1). The FLSA authorizes the Secretary of Labor to promulgate regulations defining bona fide executive. These regulations require an employee to have supervisory duties and be paid on a salary basis in order to be a bona fide executive. 29 C.F.R. § 541.1(f) & 541.117(a). The

"paid on salary basis" component means that an employee is paid a set amount per pay period regardless of the number of hours worked rather than on an hourly basis:

> [U]nder his employment agreement [the employee] regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). An exception to this rule is made for deductions taken when an employee is absent for a period of more than a day due to either personal reasons or sickness if the deduction follows a disability plan. 29 C.F.R. § 541.118(a)(2) & (3). The Department of Labor has specifically stated that this exception does not apply to absences of less than one day. U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986. The City argues that even though the captains may be literally subject to a suspension without pay for less than one day, "the realities of the City's compensation scheme" should not be ignored and the captain plaintiffs should be treated as salaried employees.

(Def.'s Proposed Findings of Fact and Conclusions of Law at 16.) The employer bears the burden of proving that an employee falls within the exemption. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974).

The Supreme Court recently considered this issue in Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Auer involved a suit brought by sergeants and a lieutenant of the St. Louis Police Department. The plaintiffs claimed that they had been unfairly denied overtime compensation because they were wrongly classified as exempt employees. The plaintiffs contended that they did not met the "salary-basis test" for exempt employees because a provision in the St. Louis Metropolitan Police Department Manual subjected them, and other ranks of police officers, to reductions in pay for disciplinary infractions relating to the quality or quantity of work they performed. Only one sergeant had ever had his pay reduced for a disciplinary infraction.

The Secretary of Labor filed an amicus brief explaining that the salary-basis test delineated in the regulations is met when "there is either an actual practice of making [deductions in pay for disciplinary infractions] or an employment policy that creates a 'significant likelihood' of such deductions." Id. at ----, 117 S.Ct. at 910. The Court deferred to the Secretary's interpretation of this regulation because it found his interpretation not to be clearly erroneous or inconsistent with the regulation. Id. at ----, 117 S.Ct. at 911; see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989). The Court found that the lieutenant and sergeants were not significantly likely to be subject to such deductions. Id. The police manual covered all department employees and could be interpreted as subjecting only those employees who were not paid on a salary basis to disciplinary deductions:

> If the statement of available penalties applied solely to petitioners, matters would be different; but since it applies both to petitioners and to employees who are unquestionably not paid on a salary basis, the expressed

> availability of disciplinary deductions may have reference only to the latter. No clear inference can be drawn as to the likelihood of a sanction's being applied to employees such as petitioners.

Id. at ----, 117 S.Ct. at 911. The Court then affirmed the Court of Appeal's determination that the employees had met the salary-basis test and were exempt from the overtime pay provisions of the FLSA.

The present case is closely analogous to Auer. No captain in the Memphis Police Department has ever been subjected to disciplinary deductions in his pay. The policy applies to police employees, other than captains, who are unquestionably not salary-based employees. This court is bound to follow the Supreme Court's determinations, and therefore finds that the salary-basis test is met and that the captain plaintiffs are exempt from the overtime provisions of the FLSA.

III. Commute Time

A. Findings of Fact

Plaintiffs also claim that the City violated the FLSA by

failing to compensate them for time spent commuting to or from work in police vehicles. The parties have stipulated that the City provides vehicles for some officers to use in commuting to and from work. These officers are requested to keep the radios on in the vehicles during their commutes. Additionally, an officer in such a vehicle is required to take appropriate law enforcement action if they encounter a disabled vehicle or observe a crime being committed during their commute. The officers are aware of the requirements to which they must adhere if they take a vehicle home. The use of these vehicles is strictly voluntary.

B. Conclusions of Law

In August of 1996, Congress passed the Employee Commuting Flexibility Act ("ECFA"), which amends the Portal-to-Portal Act, 29 U.S.C. § 254(a). The ECFA applies to any litigation pending but not decided at the time of the enactment of the ECFA. The ECFA specifically provides:

> Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act

of 1938, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and *744
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

....

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 U.S.C. § 254. Based on this statute, plaintiffs concede that the City is not required to compensate officers for commuting time if the City can establish that it has an agreement with its employees with respect to the use of the vehicle. (Pl.'s Trial Mem. at 29.) This agreement requirement may be satisfied through "a formal written agreement between the employee and employer, a collective bargaining agreement between the employees [sic] representative and the employer, or an understanding based on established industry or company practices." H.R.Rep. No. 104-585 (1996).

Here, the employees have an understanding based on the City's practices regarding the use of the vehicle. This understanding is sufficient to meet the agreement requirement under the ECFA. Therefore, the City is not required to compensate officers for time commuting in police vehicles.

IV. Vehicle Maintenance

A. Findings of Fact

Officers taking the City vehicles home are also required to maintain these vehicles and to keep them clean. As to the maintenance of the vehicles, the parties have offered conflicting versions of the facts. The plaintiffs' claim that the officers are required to perform minor maintenance on their vehicles. The City, on the other hand, states that it has a contract with local facilities to perform the maintenance at the City's expense and that the officers are merely required to schedule that maintenance. The stipulations of the parties submitted to this court do not resolve this conflict. The parties have stipulated what maintenance must be done, how long that maintenance would take, and that the City maintains a contract with a local motorcycle shop to perform maintenance on the motorcycles. (Stipulations at 2.) However, the employee bears the burden of proving that he has performed work for which he should have been compensated but was not. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946). Because the officers have failed to submit proof that they must perform the maintenance

themselves, this court finds that the officers are only required to schedule the maintenance.

B. Conclusions of Law

Whether the City is required to compensate the officers for maintaining and cleaning their vehicles is also governed by the ECFA. If that activity is "incidental to the use of an employer-provided vehicle for commuting," it is not compensable. 29 U.S.C. § 254. The House Report accompanying the ECFA states that "[i]t is not possible to define in all circumstances what specific tasks and activities would be considered 'incidental' to the use of an employers [sic] vehicle for commuting.... [R]outine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable." H.R.Rep. No. 104-585 (1996).

The officers bear the burden of proving that the City has violated the FLSA by not compensating them for work they have performed. Anderson, 328 U.S. at 687, 66 S.Ct. at 1192. They have not submitted any evidence to establish that

requiring the officers to maintain their vehicles in a clean condition is other than a minor task considered incidental, and therefore noncompensable, under the ECFA. Keeping one's vehicle clean is no more arduous than routine safety inspections. Since no proof has been offered to the contrary, the officers have failed to carry their burden of establishing that this time is compensable under the FLSA.

Further, this court finds that plaintiffs have failed to establish that they are required to perform any maintenance on the City vehicles which they take home. Additionally, the scheduling of maintenance on the vehicles is a minor task incidental to the use of the vehicle and not compensable under the FLSA.

V. Compensatory Time

A. Findings of Fact

The officers have also claimed that the City's compensatory time plan violates the FLSA. The City allows officers who work in excess of forty-three hours per week to receive either monetary compensation at a rate of one and one-

half times the employee's hourly rate or compensation in the form of time off at a rate of one and one-half hours for each hour worked in excess of forty-three.[1] When an employee wants to use the compensatory time he has earned, he must sign his name in a "logbook" and receive permission from his supervisor. An employee can place a request to use his compensatory time beginning thirty days before the requested time until the day he wants off. Once enough people have signed up to be off on a particular day such that the supervisor determines the department cannot effectively function with any more people off, the supervisor will indicate in the logbook that no one else may sign up to have compensatory time off on that day. The number of people allowed to sign up on a particular day varies with department and day. The parties have stipulated that compensatory time off is often

[1] The compensatory time plan allows officers to accumulate time up to a maximum of 480 hours. Once an officer reaches this maximum, he must take monetary compensation for overtime hours. If an employee separates from the city, he is entitled to cash payment for accumulated but unused compensatory time. These elements are also required by the FLSA, but are not at issue in this case. See 29 U.S.C. s 207(o).

granted when requested, but that officers have been denied requested time off when others want the same day off. On most occasions when an officer has requested compensatory time off but been denied that time because others had previously requested it, the City could have allowed the officer the time off by paying another officer overtime compensation to work in the requesting officer's place. As a general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time. A denial of compensatory time off, however, only occurred occasionally and was not routine. Additionally, an officer's request to have a day off may be granted and later rescinded if, due to sickness or injury, the department does not have enough officers to operate safely and effectively.

Plaintiffs claim that this plan violates the FLSA because they are not always able to take the compensatory time off when they request it even though the City could grant their requests by paying other officers at an overtime rate. The

City asserts that the requirement that the officer sign up for compensatory time before the log is full is merely the understanding or practice of the parties as to the "reasonable period" within which to request time off (i.e., if an officer did not request time off before the log was full, he did not request time off within a reasonable period of time).

B. Conclusions of Law

The FLSA allows public agencies to compensate their employees with compensatory time off at a rate of not less that one and one-half hours for each hour of employment for which overtime is required, provided that the agency follows certain criteria delineated in 29 U.S.C. § 207(o). The only criterion that plaintiffs claim the City does not meet is that an employee who has accrued compensatory time "shall be permitted to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the agency." 29 U.S.C. § 207(o) (5). The statute does not define what constitutes an "undue disruption" or a "reasonable period."

In Heaton v. Moore, 43 F.3d 1176 (8th Cir.1994), the Eighth Circuit considered whether having to pay overtime compensation constitutes an undue disruption. In Heaton, the Department of Corrections for the State of Missouri had a policy of forcing employees to use their compensatory time. The Department of Corrections claimed that this policy was necessary to thwart the undue disruption that would result if it later had to pay overtime to its employees if they had accumulated more than 480 hours. The Eighth Circuit held that the unduly disruptive language was only important if the employee had requested to use compensatory time and the request had been denied. Id. at 1181. The court went on to say, arguably in dictum, that "the eventual payment of overtime compensation as mandated by the FLSA cannot be deemed 'unduly disruptive' of the DOC's operation." Id. The court also explained that the employer has control over this situation from the front-end: "Employers are free to schedule less overtime and/or hire more corrections officers to reduce the need for compensatory time. As we have previously observed,

'[a] fundamental purpose of the Fair Labor Standards Act was to encourage employers to distribute work among a larger number of employees rather than to work employees overtime.'" Id. (citing Marshall v. Hamburg Shirt Corp., 577 F.2d 444, 446 (8th Cir.1978)); see also Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423-24, 65 S.Ct. 1242, 1244-45, 89 L.Ed. 1705 (1945) (explaining the purpose of the FLSA overtime provision); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78, 62 S.Ct. 1216, 1219-20, 86 L.Ed. 1682 (1942) (also explaining the purpose of the FLSA overtime provisions).

This court agrees with the Eighth Circuit that the necessity of paying overtime compensation does not constitute an undue disruption within the meaning of the FLSA. The Division, however, argues that its policy of not allowing compensatory time off once the logbook is full merely requires requests to be made within a reasonable period.

"Reasonable period" is defined in the Department of Labor Regulations:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.
>
> (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work.... To the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

29 C.F.R. § 553.25. The Memoranda of Understanding between the City and the plaintiffs provides that compensatory time off will be given through the use of the logbook. Once the slots in the logbook are full, an employee would be denied compensatory time off unless an emergency existed or a

substitute was found. This agreement is the type contemplated in the Department of Labor Regulations and therefore governs the meaning of "reasonable period" in this context. Thus, the plaintiffs were allowed compensatory time off when it was requested within a reasonable time and the City's policy to this effect does not violate the FLSA.

VI. Conclusion

This court holds that the captain plaintiffs are salaried employees within the meaning of the FLSA, and are therefore exempt from its overtime provision. The police officers are not entitled to compensation for time spent commuting to and from work in police vehicles or for time spent keeping these vehicles clean or scheduling their maintenance. Finally, the City's compensatory time policy is not violative of the FLSA because City employees who have earned compensatory time are able to use this time when it is requested within a reasonable period.

On the issues addressed herein, a judgment of dismissal shall be entered for the defendants.

At the pretrial conference when the issues herein addressed were submitted to the court, counsel indicated that certain other issues had been resolved through compromise. No order to that effect has been submitted. Counsel should provide the court with the appropriate order within ten days following entry of these Findings of Fact and Conclusions of Law.

IT IS SO ORDERED this 8th day of August, 1997.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM RUSSELL AIKEN, et al.,

V. NO. 93-2023-TUA

CITY OF MEMPHIS, TENNESSEE

Defendant.

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Employees of the Memphis Police Services Division filed this claim on January 7, 1993, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., alleging that the City of Memphis had failed to pay them overtime wages in violation of the FLSA. Plaintiffs' class was initially comprised of 390 persons; however, that number has subsequently decreased to 365 persons.

Plaintiffs have set forth seven specific allegations under the FLSA:

(1) Plaintiffs are entitled to overtime compensation for time they were confined to their homes under defendant' s

sick leave or "Location When Ill" Policy;

(2) Plaintiffs are entitled to overtime compensation as a result of shift scheduling;

(3) Plaintiffs are entitled to overtime compensation for time spent in training;

(4) Plaintiffs are entitled to overtime compensation for time spent caring for and transporting canines;

(5) Plaintiffs are entitled to overtime compensation relating to a vehicle provided by defendant and travel time;

(6) Plaintiffs are entitled to overtime compensation for defendant's alleged refusal to allow plaintiffs to use their accumulated compensatory time; and

(7) Plaintiffs are entitled to overtime compensation because they were improperly classified as exempt under the FLSA.

Defendant has moved for summary judgment on plaintiffs' claims numbers 1, 2, 3, 4, and 7. After consideration of

defendant's motion for summary judgment, plaintiffs have agreed to voluntarily dismiss their claims for overtime compensation based on shift scheduling (claim #2) and exemption (claim #7) with respect to plaintiffs Friedman, Ruff, Reynolds and Crawford. Therefore, the allegations before the court on the summary judgment motion are claims 1, 3, and 4.

SUBSTANTIVE LAW

1. Summary Judgment Standard

The moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court's function is not to weigh the evidence or judge its truth; rather, the court must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules ... designed 'to secure the just, speedy and

inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The substantive law governing the case will determine what issues of fact are material. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

A summary judgment movant "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). Once that burden is met, it shifts to the non-moving party to set forth specific facts showing a genuine issue of triable fact. Fed. R. Civ. P. 56(e). To meet this burden, the non-movant must do more than present some evidence that there is a disputed issue. Rather, the non-movant must present sufficient admissible evidence upon which a jury could return a verdict favorable to the non-moving party. Anderson, 477 U.S. at 249-50. Where a disputed issue of material fact is presented by

countervailing admissible evidence, the non-movant's version of such fact is presumed correct. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992).

2. Fair Labor Standards Act

The FLSA was enacted in 1938 to "achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944); see also Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 39 (1981) (FLSA enacted to ensure each employee covered by the Act receives a "fair day's pay for a fair day's work") (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1937). In 1974, Congress extended the FLSA to apply to state and local governmental bodies in addition to the federal government. 29 U.S.C. § 203(d) & (x). The FLSA requires that employees who perform more than forty "hours worked" within their regular workweek be compensated at time and one-half the "regular rate of pay" for those additional hours. 29 U.S.C. §§

207(a) (1). Because defendant is a political subdivision of the State of Tennessee, it is subject to the regulations set forth within the FLSA.

Although the FLSA clearly requires the payment of overtime wages for overtime worked, it does not set forth exactly what "type" of work is eligible for such overtime pay. See Reich v. New York City Transit Auth., 45 F.3d 646, 648 (2d Cir. 1995) ("While Congress made clear that employers are required to compensate employees for 'work' or 'employment,' it did not define the contours of the type of 'work' or 'employment' that merited such compensation."). The instant case is a dispute regarding whether various activities performed by employees are compensable under the FLSA. Although the Portal to Portal Act, which amended the FLSA in 1947, 29 U.S.C. § 251, et seq., was an attempt by Congress to "delineate certain activities which did not constitute work, and therefore did not require compensation," the Act did not resolve all potential issues under the FLSA. Thus, the matter before the court requires interpreting the

contours of coverage under the FLSA with respect to the particular circumstances presented in this case.

A. Location When Ill Policy

i. Factual Context

Plaintiffs have filed a claim for overtime compensation for hours spent at home, beyond the eight hour work day, in compliance with the defendant's "Location When Ill Policy ("LWI Policy"). Defendant's LWI Policy regulates the activities of employees who are on either sick leave or leave for on-the-job injuries. This policy, contained in Rule DR 1104 of Police Department Regulations, provides in relevant part:

A member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor. [2]

[2] After this lawsuit was filed defendant amended DR 1104 to require an employee on sick or on-the-job injury leave to only remain at home during the eight hour block of time that would normally constitute his regular work day.

The gravamen of plaintiffs' complaint is that defendant's LWI Policy so constrained their activities while on sick or injury leave that those hours spent confined in their homes should be calculated as overtime worked.[3] Because plaintiffs could not leave their homes without defendant's permission, which plaintiffs assert was denied as a matter of practice, they argue that they were "on call" to defendants and that such "on call" time is generally considered overtime when it seriously restricts an employee's activities. Plaintiffs argue that the severity of the restrictions entitle them to overtime compensation under the FLSA.

Plaintiffs allege that when they were on sick or job injury leave, they were confined to their residences twenty-four hours per day on each day that such leave was taken, and on the weekends surrounding those leave days. According to

[3] Plaintiffs are not requesting compensation for the eight hours per day that they spent asleep, or the forty hours per week for which they have already been paid.

plaintiffs, defendant's LWI Policy prohibited employees from engaging in any personal activity outside of their home during the entire twenty-four hour period for which they had taken leave. Such restrictions allegedly applied irrespective of the particular nature of the individual employee's ailments or illnesses; therefore, if an employee had broken his leg and was unable to perform police duties but was well enough to visit friends or engage in other activities, that employee was still confined to his home for the duration of his leave time.

The practical import of the LWI Policy, plaintiffs contend, was that plaintiffs were only allowed to leave their homes to obtain medical care, and even then they had to have the permission of their supervisors. Defendant did enforce the policy by making repeated telephone calls to employees that were home sick without regard to the normal work hours of the sick employee. Further, defendant also apparently encouraged the use of in-person checks in which supervisors would go to the residences of employees on sick leave and verify that they had not left their homes.

Plaintiffs contend that they should be compensated for those hours confined under the LWI Policy because defendant derived a clear benefit from the policy by curtailing potential abuse of sick leave and ensuring that its employees were ready at all times to respond to city emergencies. Employees that were found in violation of the policy were issued reprimands and suspensions without pay. The defendant contends that the rule was enforced as written -- that is, that the officers merely needed to request permission to leave home. Therefore, defendant asserts that the restrictions cannot be found to be severe and onerous.

ii. Applicable Law

The Supreme Court has consistently held that under certain circumstances, waiting time, stand-by time and on-call time are compensable under the FLSA. Skidmore v. Swift & Co., 323 U.S. 134 (1944); Armour & Co. v. Wantock, 323 U.S. 126 (1944). The basic litmus test for whether such on-call time is compensable is whether "the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits.' Martin v.Ohio Turnpike Comm'n,

968 F.2d 606, 611 (6th Cir. 1992), cert denied, ____U.S. ____ 113 S. Ct. 979 (1993). This test "requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time, and all surrounding circumstances." Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185 (citing Skidmore, 323 U.S. at 137). Courts look to the particular factual circumstances of each case in order to determine whether or not the on-call time in question should be compensable, Id.

Some courts have distinguished between employees who are "waiting to be engaged" and those that are "engaged to be waiting" to determine whether overtime compensation is warranted. See e.g., Halferty v. Pulse Drug Co. Inc., 864 F.2d 1185, 1189 (5th Cir. 1989). The distinction is that when idle time is spent predominantly for the benefit of the employer, the employee is engaged to be waiting, while if the idle time is spent for the benefit of the employee, the employee is waiting to be engaged. Id. Those courts that recognize the distinction

have determined that when the employee is engaged to be waiting, he should be entitled to compensation, but if he is waiting to be engaged, he should only be paid for time actually worked. Id. Therefore, once again the critical issue in deciding whether an employee should be compensated is whether that employee can use the time effectively for his or her own purposes. Id. If employees can visit friends, pursue hobbies, watch television, eat and sleep and engage in like activities, they are generally considered to be free to use the time for their personal benefit. See Allen v. Atlantic Richfield, 724 F.2d 1131 (5th Cir. 1984) (on-call time not compensable where workers had to remain at plant twenty-four hours a day and work twelve hours while the other twelve they were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music); Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 655-56 (10th Cir. 1988) (Time spent by drivers waiting "on call" not compensable under FLSA because drivers were not required to remain on or near employer's premises while on call, and could pursue personal

business between assignments); Pilkenton v. Appalachian Reqional Hosps., Inc., 336 F. Supp 334, 336 (W.D. Va. 1971) (on-call time not compensable because time spent by plaintiffs on call was predominantly for their own benefit and not their employers).

In Martin, the Sixth Circuit held that the court must examine the restrictions placed on the employee to determine this issue. "[T]he employees must show that the on-call policy imposes additional burdens [than Just being on call] that seriously interfere with their ability to use the time for personal pursuits." 968 F.2d at 611.

Here, defendant's LWI Policy certainly restricted the activities of its employees to some extent because employees were confined to their homes during sick or Job injury leave unless they had permission to leave home. Although employees were permitted to eat, sleep, watch television, or engage in any activity inside of their home, they were prohibited from visiting friends or doing anything else outside of their residences unless they received permission to do so.

Plaintiffs have provided various examples of the restrictions imposed upon employees on sick or job injury leave for which reprimands were issued. Such examples consistent of the following type of situations:

1. An officer recovering from an on-duty motor vehicle accident who left his home to attend a meeting of the Alumni Association at a fraternity house.

2. An officer who was recuperating from surgery and who worked part-time at a radio station until she was well enough to resume her duties as a police officer.

3. An officer who was on sick leave and left his home to pick up his son for visitation.

4. Two officers who were on sick leave for stomachaches and were not at home when whereabouts checks were performed.

5. An officer who was home for on-the-job injury leave and left work to go to the store.

6. An officer who was home on sick-leave for back pain and left his home, without a supervisor' s permission, to pick up medication. After getting his medication, he fell asleep at a cousin's house and missed three whereabouts checks.

7. An officer who called in with a toothache and recuperated at his girlfriend's house.

8. An officer who was home with gastritis and

who notified the department that he was changing locations.

9. An officer who used sick leave to attend the funeral of a family member.

See Pls.' Supplemental Resp. to Def.'s Mot. for Partial Summ. J. at 2-7.

In these examples, however, there is no showing that the officers sought and were denied, as a matter of practice, permission to carry on their activities away from home. The rule as written clearly provides that they would have been permitted to carry on these activities if they had requested and received permission. However, there is no evidence that these officers ever requested permission. The court concludes that the policy as written is not in any sense so onerous as to prevent the officers from effectively using the time for personal pursuits. Upon requesting and receiving permission, the officers were able to do anything at any location. The record simply does not permit any reasonable juror to conclude otherwise.

The plaintiffs, however, argue that the rule was not in practice what it is in writing. They assert that defendant "construed DR 1104 to allow employees to leave their residences only to obtain medical care, and then only with the permission of their supervisors." Pls.' Mem. in Resp. to Def.'s Mot. for Partial Summ. J. at 8. Plaintiffs cite to and rely on the affidavits of Jerry Moses, Robert Collins and Wanda Dodd.

The affidavit of Jerry Moses filed May 3, 1995, states that he was only allowed to obtain medical care with the permission of his supervisors. It does not indicate that permission to leave the residence was denied routinely as a matter of practice. In fact, at paragraph 16, he states that the employee would be disciplined for not being at home unless he had received prior approval to leave the home. The affidavit of Robert Collins merely testifies to his "understanding," not to the alleged practice, of denying permission as a matter of practice to leave the home upon request. The affidavit of Wanda Dodd speaks only to her "understanding" of the policy, not to the actual method or

routine manner of its application.

The court concludes after reviewing this evidence that the plaintiffs have not cited to any evidence in the record to support their argument that DR 1104 was enforced in practice by the routine refusal to grant officers permission upon request to leave their homes. Lacking such evidence there is no genuine dispute of material fact that the policy in question -- either as written or otherwise -- was so severe and onerous as to prevent employees from effectively using the time for personal pursuits.

Accordingly, the court grants the defendant' s motion for summary judgment on plaintiffs' claim for overtime compensation pursuant to defendant's LWI Policy.

B. Training Time

i. Factual Context

Plaintiffs allege that they have not been compensated for specialized training that they completed pursuant to defendant's encouragement. Specifically, several plaintiffs

contend that they were not compensated for training completed in bus driving. Those plaintiffs argue that the purpose of the bus driving training was to qualify them to drive buses of large numbers of officers in the event of a riot or other similar civil disturbance. Although these plaintiffs were compensated for some of the time spent in bus driver training, they were not compensated for the first day of training and argue that they are entitled to that compensation. Another group of plaintiffs allege that they were not compensated for training in crisis intervention and hostage negotiation. Specifically, those plaintiffs affected seek compensation for a four hour long psychological exam they were forced to undergo in satisfaction of the crisis intervention training.

ii. Applicable Law

Time spent by employees in training is generally compensable. However, 29 C.F.R. § 785.27 provides an exception to that general rule when the following four-part test is satisfied:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;
(c) The course, lecture, or meeting is not directly related to the employee's job; and
(d) The employee does not perform any productive work during such attendance.

Id. Therefore, the question before the court is whether the bus driving and crisis intervention training is exempt from regular compensation requirements.

The evidence before the court indisputably reflects that those plaintiffs who underwent the training at issue did voluntarily attend that training outside of their regular hours; thereby satisfying the first two prongs of the test.[4] However, the court further finds that a genuine dispute of fact exists regarding the third and fourth prongs of the test: whether the crisis intervention and hostage negotiation training were related to the employee' s job and whether the employee performed any productive work during the training. Because the third and fourth factors cannot be met, the court denies

[4] Officers in bus driving training were paid, but there is a dispute whether they were paid for the entire time spent in training. The court is unable to resolve that dispute on motion for summary Judgment.

defendant's motion for summary judgment on the training issue.

The crisis and hostage training apparently benefited the police department because defendant needs such trained officers in the event of an emergency. Further, plaintiffs have also set forth sufficient evidence that their time spent during training was productive because they learned the skills necessary to function in their special capacities. In Mumbower v. H.R. Callicott, 526 F.2d 1183, 1187 (8th cir. 1975), the court held that:

> The employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee' s weekly total for purposes of overtime compensation. If the employer has the power and desire to prevent such work, he must make every effort to do so,

(citing 29 C.F.R. § 785.13). Here, there is no indication that defendant did anything but encourage the plaintiffs to undergo the relevant training. Therefore, because a reasonable fact-finder could conclude that plaintiffs should be compensated

for overtime spent in specialized training, the court denies defendant's motion for summary judgment on that claim.

C. Canine Squad

i. Factual Context

Included among the police officers that are bringing this suit are officers who functioned as canine handlers for the Police Department. Canine handlers feed, exercise, groom and otherwise care for the police dogs during their off-duty hours. The canines are housed by the officer at his or her residence and canine officers are responsible for transporting the dogs to and from work in their respective police cars.

Plaintiffs that are within this group of canine handlers are seeking compensation under the FLSA for both time spent at home caring for the dogs and the transportation of the dogs to and from work. Defendant has moved for summary judgment only on the travel time issue contending that the time spent transporting the canines to and from work is not compensable under the FLSA.

ii. Applicable Law

The Portal to Portal Act ("Portal Act"), 29 U.S.C. § 251, amended the FLSA in 1947 to exempt employers from compensating their employees for preliminary activities that were "relatively effortless, [and] that were thought to fall outside the conventional expectations and customs of compensation.. Reich v. New York City Transit Auth., 45 F.3d 646, 648 (2d Cir. 1995). Specifically, the Portal Act provides that employers are not liable to employees under the FLSA for the following activities:

> (1) [W]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) [A]ctivities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time On any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a)(1) & (2). Therefore, the plain language of the Portal Act appears to render plaintiffs' claim for

compensation for travel time to and from work with the dogs noncompensable. However, § 254(a)(2) does, by implication, allow for an exception for preliminary or postliminary activities that are a necessary part of the principal activity. It is plaintiffs' contention that the responsibilities involved in caring for the dogs during the commute fall within the "principal activity" exception to the general rule of noncompensability for travel time.

Defendant argues that plaintiffs have not submitted any proof demonstrating that they engaged in activities during their commute to work which are compensable under the FLSA as amended by the Portal Act. Conversely, plaintiffs contend that canine transportation is a principal activity entitling them to compensation under the Act. To support their position that the duties performed while transporting the dogs to and from work rose to the level of compensable activity under the FLSA, plaintiffs have submitted affidavits by employees Stephen Comella, Kenneth J. Connatser and Jane Taylor Martin. The Comella, Connatser and Martin affidavits describe, among other things, the responsibilities of the canine

handlers during commute time and document specifically which activities should entitle those officers to compensation.

As previously noted, the Portal Act specifically excludes travel time to and from work from compensability under the FLSA. 29 U.S.C. § 254 (a)(1). However, an exception exists for preliminary or postliminary activities that are so integral to an employee's "principal activities," that the time is deemed compensable. Although no bright line test exists to determine whether or not any particular conduct constitutes a "principal activity," id., at 649, the Supreme Court has held that duties should be considered compensable if they are "an integral and indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956). Since the Supreme Court's decision in Steiner, a myriad of different factual circumstances have presented themselves to the courts,[5] and

[5] See Mitchell v. King Packing Co., 350 U.S. 260 (1956) (knife-sharpening for butchers before and after work is principal activity); Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47 (8th Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (Time spent driving company trucks to garage for repairs was compensable principal activity for truck drivers); Vega v. Gasper, 36 F.3d 417, 424-27 (5th Cir. 1994) (lengthy bus transportation of agricultural workers to fields not compensable where employees not required to travel in company bus).

consequently some guiding principles on identifying "principal activities" have emerged.

One such precept is that the more the preliminary or postliminary activity is undertaken for the benefit of the employer, as well as necessary for the employee to successfully complete his or her work, the more likely it is to be a compensable principal activity. Reich, 45 F.3d at 650. However, if such preliminary or postliminary work is so minimal as to render its calculation futile, then that potentially compensable time is generally disregarded. Id. See Andersen v. Mr. Clemens Pottery Co., 328 U.S. 680, 692 (articulating de minimis doctrine) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.").

Therefore, one question before the court on the canine travel time issue is whether commuting with the dogs is so

indispensable to the employee's workday as to render it compensable under the FLSA. However, even if the plaintiffs can meet that indispensability threshold, they must also demonstrate that the time spent caring for the dogs during the commute is more than just de minimis. The majority of courts faced with this issue have found that, as a matter of law, any duties performed by canine officers during the commute to and from work are minimal and therefore not compensable. See Reich, 45 F.3d at 652 ("Considered in the aggregate, the time spent by handlers in dog-care duties during the commute was neither subs tantial, nor regularly occurring"); Truslow v. Spotsylvania County Sheriff, 783 F.Supp. 274, 277 n.5 (E.D. Va. 1992) (holding that as matter of law defendants are not required to pay employees for commuting time with the dogs); Andrews v. DuBois, 888 F. Supp. 213, 219 (D. Mass. 1995) ("From the record, it appears that the presence of the dogs during the travel to and from work rarely adds even marginal amounts of time to the officers' regular commute. While it is true that loading the animals in and out of the car requires some degree of time and effort, this effort is so negligible as to be de minimis and therefore not compensable."); but see

Graham v. City of Chicago, 828 F. Supp 576, (N.D. Ill. 1993) ("[T]ime spent transporting police canines is more than merely 'riding' to work ... it is an integral and indispensable part of the officers' principal duties as canine police officers and thus not excluded from coverage.").

This court adopts the reasoning of the Second Circuit in Reich which held that only "true dog-care work occurring during the commute" is compensable. Reich, 45 F.3d at 652. After evaluating the Conflicting precedent on this issue, the Reich court returned to the "basic principle that underlies the FLSA: Employees are entitled to compensation only for 'work.'" Id. at 651. After reviewing the record, the Reich court held that the amount of time spent by the canine handlers actually working during the commute to and from work was de minimis and therefore not compensable. See id. at 652. However, the court was reviewing the record after a three day bench trial in the district court where the facts were presented and weighed by the fact- finder, not after summary judgment as in the instant case. The plaintiffs in this case have submitted affidavits detailing their responsibilities during the commute. Those duties are once again outlined in plaintiffs' statement of

undisputed facts at 78-92. Determining whether an activity is preliminary or postliminary to a principal activity is a mixed question of law and fact. Graham, 828 F. Supp at 582. "The precise nature of the Plaintiff' S duties is a question of fact while the application of the FLSA to those duties is clearly a question of law." Id. Because the facts contained in the relevant affidavits are undisputed with respect to the officers' duties during canine transportation, this court is simply charged with determining how the law applies to those undisputed facts. Thus, the issue of whether the canine transportation is compensable in this case is appropriate for summary judgment.

The Comella, Connatser and Martin affidavits set out the range of duties that officers are engaged in during their commute to and from work with their canines. Plaintiffs argue that they should be compensated for those activities which consist of: constantly monitoring the dogs in the car, verbal discipline and control of the dogs when they are affected by outside stimulus, keeping the windows open for the dogs despite the weather, and monitoring their radios so that they can respond to calls during the commute. Plaintiffs further

allege that their regular duties in caring for the dogs such as feeding, training, walking and cleaning up after them[6] also occur during the commute to and from work.

> The court finds that although there may be instances where plaintiffs have to spend some extra moments caring for the dogs during transportation time, those "few moments" are de minimis and simply not worthy of compensation under the FLSA. As the court held:
>
> > While there are occasions where dogs need to be walked or restrained, or the car requires cleaning, during the major part of commuting time no work is required. The handler merely drives with the dog in the back seat. The mere presence of a dog does not make the commute compensable.

45 F.3d at 652. See also Andrews, 888 F. Supp. at 219 ("[T]he majority of cases that have confronted the issue of police

---

[6] It is unclear to the court how the extra cleaning time that plaintiffs must spend on account of the dogs should translate into compensation for travel time. If plaintiffs believe they are entitled to compensation for cleaning time, they should request a cleaning allowance or reimbursement for that specific activity. Cleaning their vehicles is unrelated to the claim for actual time spent commuting to and from work with the canines. See Levering, 869 F. Supp at 29 ("While cleaning time and damage to the vehicle might support a request for a cleaning allowance, it is not clear how that damage and cleaning time justifies compensation for the time spent in travel.").

officers commuting with their dogs ... have concluded that such activity is explicitly excluded by the Act and that officers should not be compensated for doing what they would have to do anyway – getting themselves to work."). Should a situation arise where a canine handler has to perform an unusually significant duty during the commute which involves his dog, that handler can submit an independent request for compensation for that particular activity. If that particular activity is time actually worked and is more than de minimis, defendant has an obligation to compensate its employee for that time. However, the record before the court in this case does not contain any evidence of more than de minimis responsibilities that the canine handlers must perform during their commute to and from work. Accordingly, the court grants defendant's motion for summary judgment on the canine transportation issue.

CONCLUSION

For the reasons discussed above, defendant's motion for summary judgment is granted as to the claims under the "Location When Ill" Policy and for travel time spent while transporting canines to and from work. The motion for summary judgment on the training time issue is denied.

IT IS SO ORDERED this 29th day of December, 1995.